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No. 89-1734

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS V. CASSIDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied the doctrine of judicial estoppel to bar petitioner from relitigating the dischargeability of his tax liabilities where the court of appeals had previously concluded, after petitioner put the issue before the court, that those liabilities were nondischargeable.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Brown v. *Felson*, 442 U.S. 127 (1979)	8
Burns v. *United States*, 887 F.2d 1541 (11th Cir. 1989)	8
Cassidy v. *Commissioner*:	
51 T.C.M. (CCH) 784 (1986)	3, 4
814 F.2d 477 (7th Cir. 1987)	4
Davis v. *Wakelee*, 156 U.S. 680 (1895)	7
Edwards v. *Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982)	6
Scarano v. *Central R.R.*, 203 F.2d 150 (3d Cir. 1953)	6

Statutes and rules:

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:	
Ch. 3, 11 U.S.C. 301 *et seq.*:	
11 U.S.C. 362(a)(8)	2
Ch. 5, 11 U.S.C. 501 *et seq.*:	
11 U.S.C. 523	4
11 U.S.C. 523(a)(7)	7, 8
11 U.S.C. 523(a)(7)(A)	4
11 U.S.C. 532(c)	9
Ch. 7, 11 U.S.C. 701 *et seq.*	2
11 U.S.C. 727(b)	9
11 U.S.C. 35(a)(2) (1976)	8
11 U.S.C. 35(a)(4) (1976)	8

Statutes and rules—Continued: Page

26 U.S.C. 6653(b) 2
Bankr. R. 4007 9
T.C. R.:
Rule 90 ..... 2, 3
Rule 90(f) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 892 F.2d 637. The order of the district court (Pet. App. 27-56) and the order of bankruptcy court (App., *infra*, 1a-2a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1990. A petition for rehearing was denied on February 5, 1990. The petition for a writ of certiorari was filed on May 7, 1990 (Monday).

The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

1. On June 24, 1980, the Commissioner of Internal Revenue issued to petitioner a notice of deficiency in federal income taxes for the fiscal years ended August 31, 1974, and August 31, 1975, based on the inclusion of unreported income and the disallowance of various deductions. Since the Commissioner determined that all or part of the underpayment of tax was due to fraud, he asserted against petitioner additions to tax for fraud pursuant to 26 U.S.C. 6653(b). Petitioner filed a petition in the Tax Court seeking a redetermination of the deficiencies and additions to tax. Pet. App. 85-86.

On February 14, 1983, while the Tax Court case was pending, an involuntary petition in bankruptcy was filed against petitioner under Chapter 7 of the Bankruptcy Code (11 U.S.C.) in the United States Bankruptcy Court for the Central District of Illinois. On January 3, 1984, petitioner notified the Tax Court of that bankruptcy proceeding, and the Tax Court stayed its proceedings in accordance with the "automatic stay" requirement of 11 U.S.C. 362(a)(8). On March 13, 1984, petitioner received a discharge from the bankruptcy court, releasing him from all dischargeable debts. One month later, on the government's petition, the bankruptcy court lifted its stay to allow the Tax Court case to proceed. Pet. App. 87-88.

The Commissioner then mailed to petitioner a request for admissions, together with other discovery documents, pursuant to Rule 90 of the Rules of Practice and Procedure of the United States Tax Court (Jan. 16, 1984). When petitioner failed to respond

to the request for admissions within the 30-day period provided by Tax Court Rule 90, the Commissioner moved for summary judgment.[1] The Tax Court held that the matters set forth in the request for admissions were deemed admitted, and it then gave petitioner an opportunity to respond to the Commissioner's motion. As part of his response, petitioner filed a motion to dismiss with prejudice and a motion for summary judgment in which he asserted that the tax liabilities had been discharged in bankruptcy. Pet. App. 89-91.

Following a hearing, the Tax Court granted the Commissioner's motion for summary judgment. 51 T.C.M. (CCH) 784 (1986); see also Pet. App. 81-83; *id.* at 93-95. The court found that the request for admissions had been mailed on June 12, 1984, and that the matters contained in the request should be deemed to be admitted because petitioner had failed to respond to them within 30 days. The court held that the deemed admissions fully supported the deficiencies determined by the Commissioner, and that the admitted facts were sufficient to meet the Commissioner's burden in proving that the additions to tax for fraud should be imposed.

The Tax Court also summarily denied petitioner's motion for summary judgment, which had been based on the contention that his tax liabilities were discharged in bankruptcy. The court observed that the case before it was for redetermination of income tax deficiencies, not for review of collection matters. It explained that "if there is any question as to the collectibility of any income tax deficiencies, which we

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[1] Petitioner had previously ignored other informal and formal discovery requests made by the Commissioner. Pet. App. 87.

doubt, that question is beyond the jurisdiction of this Court." 51 T.C.M. at 786 n.3; see Pet. App. 4-5.

Petitioner appealed, renewing his contention that the tax liabilities had been discharged in bankruptcy, and the court of appeals affirmed. 814 F.2d 477 (*Cassidy I*) (Pet. App. 84-106). The court specifically noted and rejected petitioner's argument that the tax liabilities and additions to tax for fraud had been discharged (Pet. App. 96-98). The court stated that petitioner "first argues that his tax liabilities and fraud penalties were discharged in the chapter 7 bankruptcy proceeding" (*id.* at 96). The court explained that Section 523 of the Bankruptcy Code excepts certain debts from discharge and held that because petitioner's "deficiencies here resulted from fraud, subsection 523(a)(1)(C) renders them nondischargeable" (Pet. App. 97). The court of appeals further stated that, since the underlying taxes were nondischargeable, the additions to tax for fraud "are similarly nondischargeable," pursuant to 11 U.S.C. 523(a)(7)(A) (Pet. App. 98). Petitioner did not seek further review.

2. About eight months after the Seventh Circuit decided in *Cassidy I* that the tax liability and additions to tax were nondischargeable, petitioner filed with the United States Bankruptcy Court for the Central District of Illinois a complaint to determine the dischargeability of his liability for the same taxes and additions to tax. The government moved to dismiss the complaint on res judicata grounds. The bankruptcy court granted the government's motion (App., *infra*, 1a-2a), and petitioner appealed to the district court. The district court affirmed (Pet. App. 27-56), finding that petitioner's complaint was barred by principles of collateral estoppel, rather than res judicata (see *id.* at 28, 36).

The court of appeals affirmed (*Cassidy II*) (Pet. App. 1-24). The court ruled that the doctrines of collateral estoppel and res judicata were "technically inapplicable" because the Tax Court in *Cassidy I* did not have jurisdiction to determine the dischargeability of the liability. Accordingly, the court of appeals found that its own decision in *Cassidy I* was not entitled to res judicata or collateral estoppel effect on this point because the portion of the opinion addressed to dischargeability was dictum that was unnecessary to affirming the Tax Court's judgment. Pet. App. 9-12. Moreover, the court of appeals observed, under Tax Court Rule 90(f) deemed admissions in a Tax Court proceeding may not be used in a bankruptcy proceeding (see Pet. App. 9), and therefore the Tax Court's finding of fraud in *Cassidy I* was not entitled to preclusive effect in the bankruptcy court.

The court of appeals held, however, that the doctrine of judicial estoppel barred petitioner from relitigating the dischargeability issue (Pet. App. 12-21). The court stated that this doctrine is "intended to prevent the perversion of the judicial process" by forbidding a litigant from taking inconsistent positions whenever it suits his interest at the time (*id.* at 13). The court explained that petitioner was now seeking to advance a position diametrically opposite to the one that he successfully urged upon the court of appeals on the prior appeal, and that he is estopped from doing so (*id.* at 16-17):

> [Petitioner] unequivocally urged the *Cassidy I* court to consider the defense of discharge. His present position is that it was error for the court to give him what he wanted. Even though [petitioner] did not prevail on appeal as a whole, he

> did prevail on the subsidiary question of what issues were to be decided by the court. * * * [Petitioner's] maneuverings were clearly intended to delay the inevitable day of reckoning, and in maneuvering he is trying to whipsaw this court. That is exactly the evil that the doctrine of judicial estoppel was meant to avoid.

The court concluded that "[i]t would be unjust to require the Commissioner to relitigate a question that was originally raised by [petitioner] himself, or to allow [petitioner] a second full-scale adjudication of an issue that the court has already resolved against him" (Pet. App. 21).

ARGUMENT

The court of appeals correctly held that, in light of his representations in the prior appeal, petitioner was estopped from relitigating here the court's conclusion on the prior appeal that petitioner's additions to tax for fraud were not discharged in bankruptcy. This holding turns on the facts of this case and does not conflict with any decision of this Court or of another court of appeals. Accordingly, there is no reason for further review.

1. As the court of appeals explained (Pet. App. 13), the doctrine of judicial estoppel is intended to prevent a party from perverting the judicial process by taking inconsistent positions. See, *e.g.*, *Edwards* v. *Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982); *Scarano* v. *Central R.R.*, 203 F.2d 510, 513 (3d Cir. 1953). This Court long ago observed that, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."

Davis v. *Wakelee*, 156 U.S. 680, 689 (1895). That principle was correctly applied by the court of appeals to bar petitioner's effort to relitigate the question of dischargeability of the fraud penalties.

Petitioner clearly has taken inconsistent positions in the course of his continuing efforts to have the courts declare that his bankruptcy discharged any liability for fraud penalties. In *Cassidy I*, petitioner urged before both the Tax Court and the court of appeals that fraud penalties should not be imposed because they had been discharged in bankruptcy. In accordance with petitioner's submission that the question of dischargeability should be resolved on appeal from the Tax Court, the Seventh Circuit rejected petitioner's position on the merits, ruling that Section 523(a)(7) of the Bankruptcy Code exempted the fraud penalties from discharge. Now, in *Cassidy II*, petitioner takes precisely the opposite position regarding the proper scope of the Tax Court proceeding. Contradicting his prior assertion that the question of dischargeability was properly raised in the Tax Court, petitioner argues that the question was not before the Tax Court and therefore that the Seventh Circuit's rejection in *Cassidy I* of his claim on the merits should be disregarded as dictum. The court of appeals correctly held that petitioner is estopped from making this argument. Having argued to the Seventh Circuit in *Cassidy I* that it was required to rule on dischargeability, thereby inducing the court to address the merits of that issue, petitioner is not free on a second appeal to contradict that argument now that he is dissatisfied with the court's resolution on the merits. As the court of appeals stated below (Pet. App. 17), this is an effort "to whipsaw this

court [, which] * * * is exactly the evil that the doctrine of judicial estopped was meant to avoid." [2]

Contrary to petitioner's contention (Pet. 51), the decision below is fully consistent with this Court's decision in *Brown* v. *Felson*, 442 U.S. 127 (1979). In that case, a debtor filed for bankruptcy after stipulating in a state court collection suit that a creditor was entitled to judgment on a particular claim. In the subsequent bankruptcy proceeding, the creditor asserted that the liability was nondischargeable under pre-Bankruptcy Code law (11 U.S.C. 35(a)(2) and (4) (1976)) because the liability arose from fraud or obtaining money under false pretenses. The debtor objected that res judicata principles barred the creditor from asserting fraud because the stipulated judgment that concluded the state court action made no reference to fraud. This Court disagreed, holding that the creditor could introduce evidence in the bankruptcy court to support his contention of fraud, in response to the new defense of bankruptcy interposed by the debtor. The Court explained that the debtor

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[2] Petitioner devotes the bulk of his submission to arguing the merits of the dischargeability issue, which was not reached by the court of appeals below. See Pet. 40-49. Thus, petitioner correctly notes that the Eleventh Circuit held in *Burns* v. *United States*, 887 F.2d 1541 (1989), that additions to tax for fraud may be dischargeable under 11 U.S.C. 523(a)(7), even though the underlying tax liabilities are not. While the *Burns* decision is at odds with the conclusion of the Seventh Circuit on this point in *Cassidy I*, this case presents no occasion for this Court to resolve the disagreement between those two courts. The decision in *Cassidy I* is not before the Court on this petition; the decision of the court of appeals below did not address the merits of the dischargeability issue, but rather held—correctly—only that petitioner is estopped from relitigating that issue after he sought and obtained a ruling on it in *Cassidy I*.

had "upset the repose that would justify treating the prior state-court proceeding as final, and it would hardly promote confidence in judgments to prevent [the creditor] from meeting [the debtor's] new initiative." 442 U.S. at 133-134.

That decision lends no support to petitioner. In contrast to the creditor in *Brown*, petitioner here is not merely seeking an opportunity to "actually litigate" (see Pet. 51) for the first time an issue that previously had not assumed any importance; rather, he is seeking an opportunity to litigate for the second time an issue that he had already persuaded the court of appeals to decide on a previous occasion. Nothing in this Court's decision in *Brown* suggests that a court must allow a dissatisfied litigant to contradict his prior position concerning the court's jurisdiction to rule on an issue in order to give that litigant an opportunity to relitigate the court's initial ruling.[3]

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[3] Petitioner appears to suggest (Pet. 52-53) that all of his tax debts were discharged because the IRS did not file a request to determine dischargeability or object to the bankruptcy court's discharge order. This suggestion is entirely without merit. The Bankruptcy Code provides that a discharge order discharges the debtor of all pre-bankruptcy liabilities, except as provided in Section 523. See 11 U.S.C. 727(b). Except in limited circumstances not applicable here (see 11 U.S.C. 523(c); Bankr. R. 4007), a creditor is not required to obtain a bankruptcy court determination that its claim falls within the exceptions under Section 523. Thus, there was no need for the IRS to seek to litigate in the bankruptcy court the question whether its tax debts were excepted from discharge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1990

APPENDIX

UNITED STATES BANKRUPTCY COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

Case No. 183-00222

Adversary No. 87-8250

IN RE THOMAS V. CASSIDY, DEBTOR

THOMAS V. CASSIDY, PLAINTIFF,

v.

COMMISSIONER OF INTERNAL REVENUE, DEFENDANT.

ORDER

The debtor, having filed a Complaint to Determine Dischargeability of a Debt;

The defendant, United States of America, on behalf of its agency, the Internal Revenue Service, having filed a Motion to Dismiss Complaint to Determine Dischargeability of a Debt;

The Court, having provided notice to creditors and other parties in interest of a hearing in said cause on January 25, 1988, with regard to defendant's Motion to Dismiss;

The defendant, United States of America, on behalf of its agency, the Internal Revenue Service, having filed a Motion to Tax Costs, at said hearing; and

These matters having been heard on January 25, 1988,

IT IS HEREBY ORDERED that defendant's Motion to Dismiss Complaint to Determine Dischargeability of a Debt is granted; and

That defendant's Motion to Tax Costs is denied.

Dated: 2-4-88.

By the Court:

/s/ William V. Ottenberger
U.S. Bankruptcy Judge
100 N.E. Monroe Street
Room 156, Federal Bldg.
Peoria, Illinois 61602

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